Landell, 382 F.3d at 115, in the sense that, by limiting what candidates themselves can spend, candidate expenditure limits make expenditures by groups of ordinary citizens *more* significant and thus amplify the voices of the citizenry to which the candidates are supposed to be responsive. Such limits actually promote and enhance access to participation in the political process by ordinary citizens, acting both individually and in association with each other.

In particular, Act 64 enhances the role and power of political parties. To be sure, Act 64 treats political party committees like other contributors with respect to their ability to make monetary or in-kind contributions *to* candidates: a political party cannot contribute to a candidate, or make an expenditure coordinated with a candidate, of more than $200 for state representative, $300 for state senator or county office and $400 for statewide office. Vt. Stat. Ann. Tit. 17, §§ 2805(a)-(b). A political party expenditure that is coordinated with a candidate is deemed to be a "related campaign expenditure," which is treated in the same way as a contribution. *Id.* §§ 2809(c) & (d). However, under the Act, while *candidates* are limited in what they can spend, political parties are *not* so limited. To the contrary, parties can make two categories of unlimited expenditures that can significantly promote their platforms and help elect their candidates.

First, under Act 64, party committees can freely undertake spending to promote the party, its views and platform and its candidates generally, including voter registration, voter turnout efforts and generic communications promoting the party and its positions ("Vote Democrat") without referencing specific candidates. The Vermont Secretary of State has authoritatively interpreted the Act to mean that an expenditure by a political party that substantially benefits more than six candidates "and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure,"

Administrative Rule 2000-1, "Vermont Campaign Finance Law Regulation of Related Expenses," § 3. The result of this interpretation is that such party expenditures are *not* treated as contributions, and are therefore unlimited.

Second, under Act 64 political parties are free to make unlimited independent expenditures on behalf of specific candidates. A party expenditure is treated as a "related campaign expenditure," and thus as a contribution subject to the Act's limits, only if it is "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. Tit. 17 § 2809(c). If a party expenditure does not meet this definition, it is deemed to be independent, and *not* subject to any limit.[2]

Strengthening the role of parties, as Act 64 does, is in itself a compelling governmental interest. First, it has been widely recognized that strong political parties serve a vital role in our democracy, in particular, in giving voice to ordinary citizens in the political process and combating the undue influence of special interests. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic*

---

[2] While section 2809(d) of the Act creates a rebuttable presumption that a party expenditure that "primarily benefits six or fewer candidates who are associated with the political party. . . is presumed to be a related expenditure," and thus subject to the contribution limits, that presumption has been interpreted by the Secretary of State to be rebuttable—that is, a party committee may establish that its expenditure was independent by presenting "evidence that the elements of the definition" of "related campaign expenditure" were not met. Administrative Rule 2000-1, § 3(d). In any event, the presumption provision in itself is not critical to achievement of Act 64's important purposes and, if necessary, is severable from the rest of the Act. Vt. Stat. Ann. Tit. 1 § 215; *see Landell*, 118 F. Supp. 2d at 492-93.

Party v. Jones, 530 U.S. 567, 574 (2000). "[P]olitical parties are the voluntary associations principally committed to making democracy work." Nancy L. Rosenblum, *Symposium: Law and Political Parties: Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 814 (2000).

Because political parties "are bodies large enough to translate the people's will into action, they bridge the gap between the electors and the government, ensuring that the people have a voice." Clarisa Long, *Note: Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161, 1175 (1994). As one commentator has noted:

> Parties perform at least four critical functions for American democracy. They promote a competitive electoral environment ("competitiveness"); they aggregate interest groups and minorities into electoral and policymaking coalitions ("representation"); they coordinate between officials in each branch and level of government ("governance"); and they sometimes behave like other types of political organizations that exist mainly to express members' policy positions and beliefs ("expression").

Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 793 (2001). "Parties are a force of unification in the divided American policy system . . . .[T]hey bring people of diverse political views together; by providing a structure to bring divergent social and ideological groups together, parties limit the destructive impact of factionalism." Amanda G. Altman, *Note: Party Poopers: The Supreme Court Overlooks the Party in Federal Election Commission v Colorado Republican Federal Campaign Committee*, 46 ST. LOUIS L.J. 1001, 1030 (2002).

Second, these functions have been undermined since *Buckley* as candidates have increasingly become individual entrepreneurs, able to raise and spend unlimited sums in their

own right, and less dependent on the parties. "[T]oday, even partisan candidates build and operate organizations largely independent of the state and national parties . . . . Candidates raise their own money. They hire their own contractors . . . ." Rosenblum, *supra*, 100 COLUM. L. REV. at 814. "Those candidates who reach Congress are more independent of party selection, support and discipline today than at any previous time in our history. . . .They now owe loyalty not to a party with a reasonably coherent view of the right mix of national policy, but to a variety of narrowly focused pressure groups with disparate and conflicting views." Lloyd Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 34 (1985). These "declines in party government and party loyalty . . . are of enormous current importance . . . .[T]they go far to explain the national disappointment in the effectiveness of Congress and of the national government . . . ." *Id.* at 27.

Act 64 thus helps restore the ability of party committees, at least in Vermont, to serve the critical functions of unification, giving voice to the views of voters and achieving better governance. Enhancing and restoring the role of political parties in this way should be regarded as an especially compelling governmental interest.

C. Deference Should Be Accorded to the Decision of Vermont Legislators to Limit Their Own Spending Relative to That of Other Political Actors

While *Buckley* counseled against restricting "the speech of some elements of our society in order to enhance the relative voice of others," *Buckley*, 424 U.S. at 48-49, "those words cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many . . . ." *Nixon v. Shrink Missouri*

Government PAC, 528 U.S. 377, 402 (2000)(Breyer, J., concurring).

More critically, the *Buckley* language should, as a logical matter, be given far less weight when, as in this case, lawmakers are restricting their *own* campaign spending, rather than that of others. The Court has afforded deference generally to the determinations of legislators about the need for laws that regulate campaign finance, underscoring the need to "show[] proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 137 (2003). "[S]uch deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity . . . ." *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003).

In *McConnell*, for example, the Court upheld virtually all of the provisions of the Bipartisan Campaign Act of 2002 ("BCRA") even though that law sharply reduced the resources available to national and state political party committees, 2 U.S.C. § 441i, and outlawed much broadcast advertising criticizing Members of Congress, 2 U.S.C. §§ 434(f)(3), 441b(b)(2), while *increasing* the limits on contributions to the very Members of Congress who enacted the law. 2 U.S.C. § 441a(a). "We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice . . . ." *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting).

If BCRA did not impermissibly "restrict the speech of some elements of our society in order to enhance the voice of others," *Buckley*, 424 U.S. at 48-49, then surely Act 64 does not. Far from restricting the voice of critics while enhancing their own, the Vermont legislators who enacted Act 64 did the opposite: they restricted *their own* spending, while enhancing the significance of the spending of *other* political

actors. Special deference should therefore be accorded to their judgments about the compelling need to impose such restrictions in the form of the candidate expenditure limitations.

In this regard, it is not true that Act 64's "limits on candidate expenditures tend to disadvantage challengers in campaigns against incumbents." *Landell*, 382 F.3d at 178 (Winter, J., dissenting). To be sure, as Judge Winter noted, "When campaign finance legislation is considered by those in power, there is both motive and opportunity to craft rules that will restrain the political activity of opponents." *Id.* at 158. Such motive and opportunity are not evident in this case, however.

First, the limits on candidate spending here are set at such affordable levels that there is little doubt that any serious challenger would be able to match the incumbent's spending—a situation that is an improvement over the typical circumstances faced by challengers. The trial record in this case included evidence that spending limits reduce the disparity between challenger and incumbent spending, and thus actually advantage *challengers*. *Landell*, 382 F.3d at 128. Second, unlike any other federal or state campaign finance law ever passed to our knowledge, Act 64 actually sets spending limits lower for incumbents than for challengers: incumbent candidates for statewide office can spend only 85% of the limit for challengers and incumbent candidates for the legislature can only spend 90%. Vt. Stat. Ann. Tit. 17 § 2805a(c). Finally, as discussed in section II(B), *supra*, the party committees are not limited in their spending on behalf of challengers, either through voter mobilization activities or through independent spending on behalf of specific challengers.

For these reasons, particular deference should be accorded to the judgment of the Vermont legislators who enacted Act 64, about the compelling need to impose candidate expenditure limitations.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

AMANDA S. LAFORGE
DEMOCRATIC NATIONAL COMMITTEE
430 S. Capitol Street, S.E.
Washington, D.C. 20003
(202) 863-8000

JOSEPH E. SANDLER
Counsel of Record
NEIL P. REIFF
STEPHEN E. HERSHKOWITZ
SANDLER, REIFF & YOUNG
50 E Street, S.E. # 300
Washington, D.C. 20003
(202) 479-1111

Counsel for Amicus Curiae

February 8, 2006

(35) (52) (21)

MOTION FILED Nos. 04-1528, 04-1539, and 04-1697

FEB 10 2005

IN THE

Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

—v.—

WILLIAM H. SORRELL, et al.,

Respondents.

(Caption continued on inside cover)

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, JOHN SHATTUCK, HELEN HERSHKOFF, AND CHARLES S. SIMS, AS FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS WILLIAM H. SORRELL, et al.

BURT NEUBORNE*
NORMAN DORSEN
DAVID GANS
VANDERBILT HALL
40 Washington Square South
New York, New York 10012
(212) 998-6172

**Counsel of Record*

BEST AVAILABLE COPY

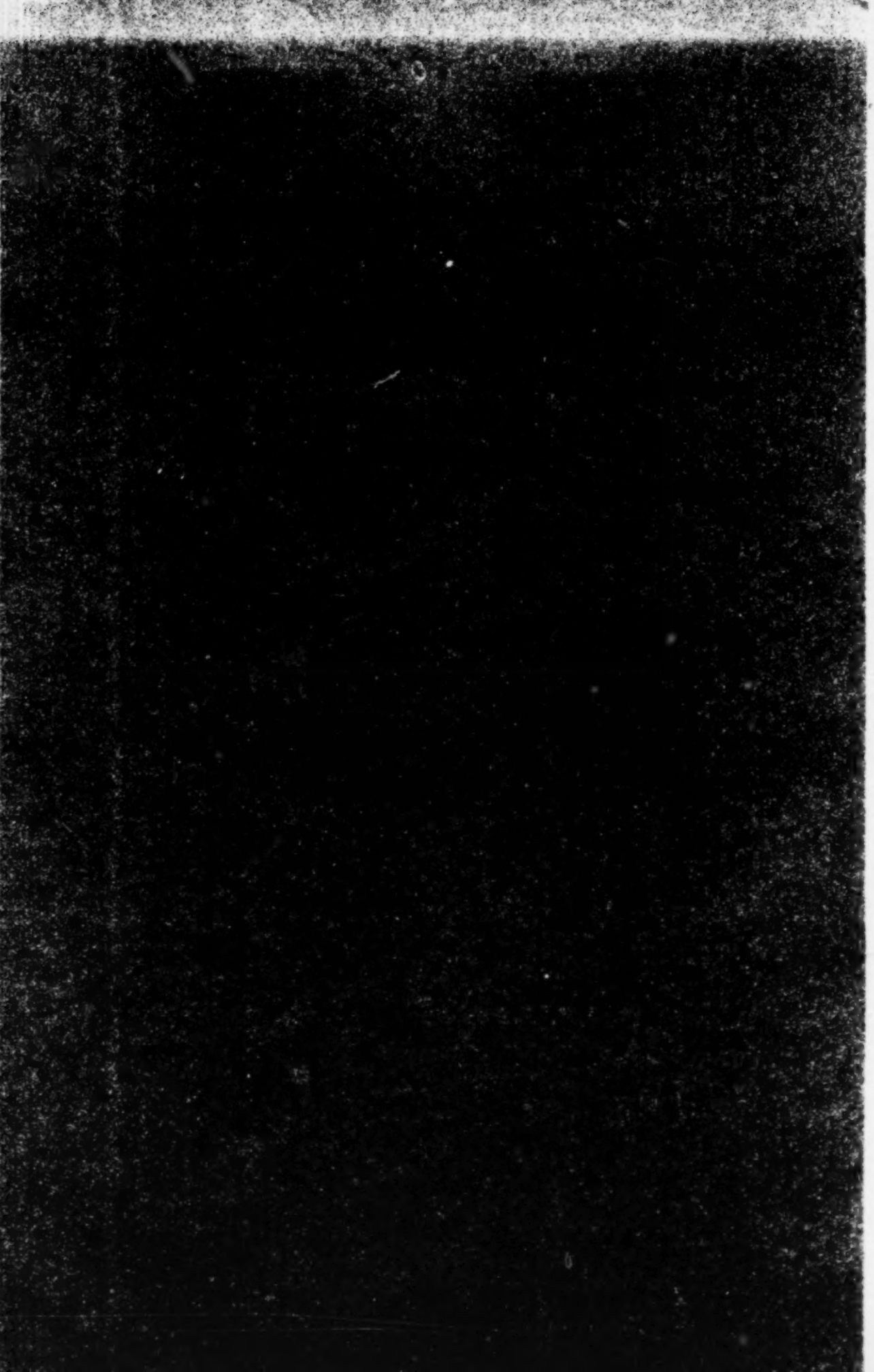

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICI.....	1
SUMMARY OF ARGUMENT: THE CURRENT LEGAL AND FACTUAL CONTEXT.....	2
ARGUMENT	9
I. Generous Expenditure Ceilings Are Constitutional Because They: (A) Free Candidates From an Endless Spiral of Fundraising; (B) Counteract the Risk of Corruption Generated By Such an Endless Fundraising Spiral; and (C) Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates	9
A. Introduction: The Available Options.....	9
B. Generous Expenditure Ceilings Advance the Autonomy of Candidates by Freeing Them From Becoming Trapped in an Endless Spiral of Reciprocal "Defensive" Fundraising	11
C. Generous Expenditure Ceilings Counteract the Risk of Corruption Generated by "Defensive" Fundraising	16

PAGE

D. Generous Expenditure Ceilings Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates. 19

II. Unduly Low Spending Ceilings That Prevent the Expenditure of Resources Needed for Effective Campaign Advocacy Violate the First Amendment 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. Celebrezze, 460 U.S. 783 (1983) ... 22

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) 18

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 3

Brandenburg v. Ohio, 395 U.S. 444 (1969) 11

Buckley v. Valeo, 424 U.S. 1 (1976) .....*passim*

Burson v. Freeman, 504 U.S. 191 (1992)..... 3, 18

California Medical Ass'n v. FEC, 453 U.S. 182 (1981) 3

Colorado Repub. Fed'l Campaign Comm. v. FEC, 518 U.S. 604 (1996) 2, 15

FEC v. Beaumont, 539 U.S. 146 (2003) 3, 4-5

FEC v. Colorado Repub. Fed'l Campaign Comm., 533 U.S. 431 (2001) 3, 6, 17

FEC v. MCFL, 479 U.S. 238 (1986) 3

FEC v. National Right to Work Comm., 459 U.S. 197 (1982) 17

FEC v. NCPAC, 470 U.S. 480 (1985) 2

Harris v. McCrae, 448 U.S. 297 (1980) 10

Homans v. City of Albuquerque, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004) 2

PAGE

Johanns v. Livestock Marketing Ass'n, 125 S. Ct. 2055 (2005) 11

Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998) 2

Landell v. Sorrell, 382 F.3d 91 (2nd Cir. 2004) .. 16

Landell v. Sorrell, 406 F.3d 159 (2d Cir. 2005) .. 2, 21

McConnell v. FEC, 540 U.S. 93 (2003) .....*passim*

Meyer v. Grant, 486 U.S. 414 (1988) 2

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) .....*passim*

Republican Nat'l Comm. v. FEC, 487 F. Supp. 280 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 995 (1980) 4

Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312 (9th Cir. 1992) 2

Storer v. Brown, 415 U.S. 724 (1974) 22-23

Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997) 18

United States v. Dixon, 509 U.S. 688 (1993) 11

United States v. Gaudin, 515 U.S. 506 (1995) ... 11

United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961) 20

Rules:

Supreme Court Rule 37.6 1

PAGE

Other Authorities:

Allan I. Abramowitz, et al. *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75-88 (2006) 7, 19

Anne E. Kornblut, *Lobbyist Accepts Plea Deal and Becomes Star Witness in a Wider Corruption Case*, N.Y. Times, Jan. 4, 2006 . 6

David Chen, *Bloomberg Cruises to Re-election Victory; Corzine is Winner in Costly New Jersey Race*, N.Y. Times, Nov. 9, 2005 7

Garrett Hardin, *The Tragedy of the Commons, Science*, pp. 1243-48 (Dec. 13, 1968) 5

James D. Miller, *Game Theory at Work* (2003) .. 6

John M. De Figueiredo and Elizabeth Garrett, *Paying for Politics*, 78 S. Cal. L. Rev. 591 (2005) 10

Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311 5

Phillip Schrodt, *Richardson's Arms Race Model*, National Collegiate Software Clearinghouse, Raleigh, North Carolina (1987) 5, 14

Phillip Shenon, *Top Aide to DeLay Pleads Guilty to Conspiracy*, N.Y. Times, Nov. 22, 2005 .. 6

Phillip Shenon & Carl Hulse, *DeLay is Indicted in Texas Case and Forfeits G.O.P. House Post*, N.Y. Times, Sept. 29, 2005 6

PAGE

Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 Election L. J. 147 (2004) 6

Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: Constiutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004) 13

Robert Axelrod, *The Evolution of Cooperation* (1984) 6

Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999) 6, 15, 16

Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem* (Available at *http://law.bepress.com/cgi/viewcontent.cgi?article=2317&context=expresso*) (last visited February 8, 2006) 6

Spencer Overton, *The Donor Class: Campaign Finance, Democracy and Participation*, 155 U. Pa. L. Rev. 73 (1994) 19

Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005) 21

Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277 (1993) 7

Thomas C. Schelling, *The Strategy of Conflict* (1980 ed.) 5-6, 14

PAGE

Vincent Blasi, *Free Speech and the Widening Gyre of Fund Raising: Why Campaign Speech Limits May Not Violate the First Amendment*, 94 Colum. L. Rev. 1281 (1994).....6, 13, 15

William Poundstone, *Prisoner's Dilemma* (1993)..... 6

I

INTEREST OF AMICI

Amici are former senior officials of the American Civil Liberties Union (ACLU).[1] Norman Dorsen served as President of the ACLU from 1976-1991, and as its General Counsel from 1969-1976. He is currently Stokes Professor of Law at New York University School of Law. Aryeh Neier served as Executive Director of the ACLU from 1973-1981. He is currently President of the Open Society Institute. Burt Neuborne served as Legal Director of the ACLU from 1981-1986. He is currently Inez Millholland Professor of Civil Liberties at New York University School of Law. John Shattuck served as Director of the ACLU's Washington office, and as a National Staff Counsel from 1971-1984. He is currently Executive Director of the JFK Library Foundation. Helen Hershkoff served as an Associate Legal Director of the ACLU from 1987-1995. She is currently Professor of Law at New York University School of Law and co-director of the Arthur Garfield Hays Civil Liberties Program. Charles S. Sims served as an Associate Legal Director of the ACLU from 1983-1986. He is currently a partner in the firm of Proskauer Rose LLP.

While a*mici* continue to support the ACLU's matchless efforts in defense of the First Amendment, we oppose the contention in this case that ceilings on campaign expenditures are categorically unconstitutional. *Amici* believe that generous campaign expenditure ceilings free candidates, voters, campaign contributors and the general public from hydraulic pressures unleashed by a limitless demand for

---

[1] All parties have consented to the filing of this brief. Written copies of their consents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no one other than *amici* has made a monetary contribution to its preparation or submission, other than assistance by New York University School of Law in the brief's production and filing.

campaign funds that impede the development of substantive issues, breed corruption, and decrease the quality of electoral debate. Because *amici* believe that important First Amendment values exist on *both* sides of the regulatory equation in this case, we respectfully submit this brief *amici curiae* urging the Court to permit legislatures to enact generous ceilings on campaign expenditures.

SUMMARY OF ARGUMENT:

THE CURRENT LEGAL AND FACTUAL CONTEXT

As Chief Judge Walker noted below, most lower courts read *Buckley v. Valeo*, 424 U.S. 1 (1976), as requiring the invalidation of all government-imposed ceilings on campaign expenditures by candidates,[2] no matter how generous the ceiling. *Landell v. Sorrell*, 406 F.3d 159, 170 (2d Cir. 2005) (Walker, C.J., dissenting from the denial of rehearing *en banc*). *See Homans v. City of Albuquerque*, 366 F.3d 900, 914 (10th Cir.) (invalidating spending ceiling), *cert. denied*, 125 S. Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir. 1998) (same); *see also Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312 (9th Cir. 1992).

Indeed, in the thirty years since *Buckley*, although the precise question of a candidate-expenditure limit has not reached the Court, this Court has not sustained a government effort to limit campaign expenditures outside the narrow context of corporate spending. *Compare FEC v. NCPAC*, 470 U.S. 480 (1985) (invalidating limit on uncoordinated independent expenditures); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on use of paid petition signature gatherers); *Colorado Repub. Fed'l Campaign Comm v. FEC*, 518 U.S. 604 (1996) (invalidating ban on independent expenditures by political party prior to the selection of its

---

[2] This case does not involve the related but analytically distinct issue of efforts to limit independent campaign expenditures by third-persons.

candidate) *with Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on corporate campaign spending).[3]

Conversely, in the years since *Buckley*, this Court has repeatedly sustained government efforts to limit the size, source and timing of campaign contributions. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (sustaining contribution limits to PACS); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (sustaining state contribution limits); *FEC v. Beaumont*, 539 U.S. 146 (2003) (sustaining corporate contribution limits); *McConnell v. FEC*, 540 U.S. 93 (2003) (sustaining comprehensive regulation of contributions).[4]

The differential judicial treatment of campaign contributions and expenditures flows directly from *Buckley*'s analytic framework. As Justice Stevens explained in *McConnell*, the *Buckley* Court viewed campaign expenditures as a form of direct speech by candidates. *McConnell*, 540 U.S. at 120-21.[5] As such, campaign expenditures may be regulated only if necessary to advance a compelling government interest. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (applying classic First Amendment weighted balancing test to uphold bans on electioneering within 100 feet of the polls).

Buckley held that the Federal Election Campaign Act's spending ceilings failed to advance a compelling governmental interest. The *Buckley* Court ruled, first, that the government's undoubted interest in equalizing political

---

[3] *See FEC v. MCFL*, 479 U.S. 238 (1986) (recognizing "grassroots" exception to *Austin*).

[4] Coordinated expenditures have been treated as contributions. *See FEC v. Colorado Repub. Fed'l Campaign Comm.*, 533 U.S. 431 (2001).

[5] Justice Stevens has consistently questioned the equivalence between speech and money inherent in the *Buckley* analysis. *See Shrink Missouri*, 528 U.S. at 398 (Stevens, J., concurring).